LEGAL OPINION

FOR : Guyrá Paraguay

FROM : Juan Carlos Mendonça Bonnet

REFERENCE : Legal Status of “Parque Nacional San Rafael”

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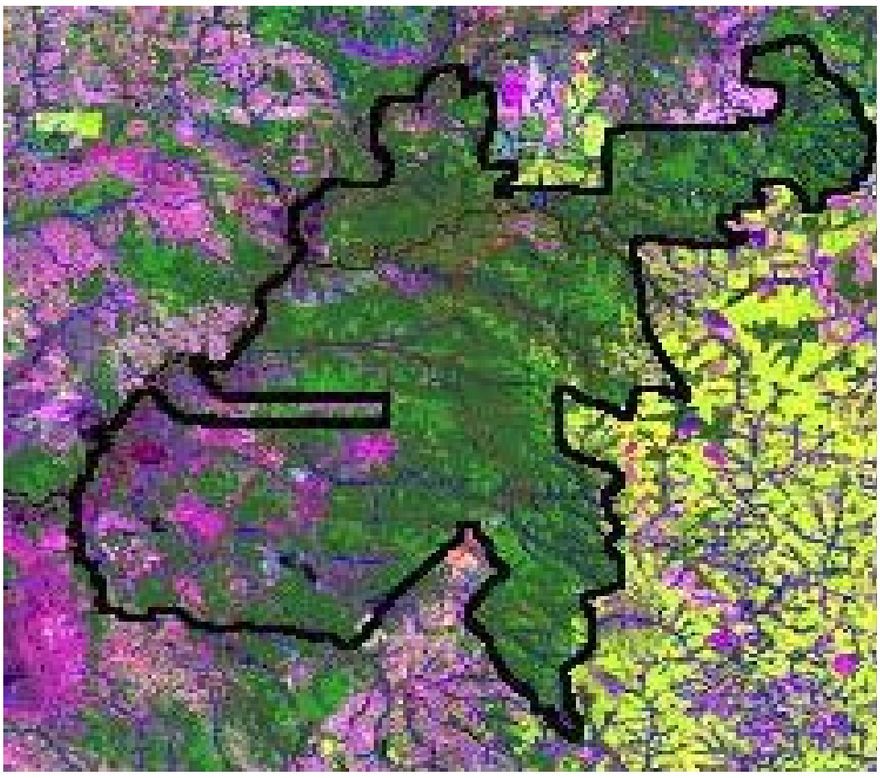

Reserved Protected Forest Area, Parque “San Rafael”

Our views have been sought for the following:

1. Identificación of national legislation and international agreements that affect the tenure of the national, private and communal land use as well as the property rights in the Reserve Area for San Rafael National Park, with the assessment of their implications for the project;
2. Evaluation of the laws related to the recognition or claims of the traditional or customary rights;
3. Evaluation of the effectiveness of the legal framework and measures currently under consideration for approval. .

1. RESPONSE TO THE FIRST CONSULTATION.

1.1. IDENTIFICATION OF THE LEGISLATION

The following laws, decrees and resolutions have been identified as relevant:

C*onstitution /92*, in the articles referring to the environment and private property.

Law No. 422/73 "*Forests*".
Law No. 583/76 "*Which Approves and Ratifies the Convention on International Trade of Endangered Wild Fauna and Flora Species.* ".
Law No. 904/81 "*Law of Indigenous Communities".*
Law No. 1.183/87 "*Civil Code*".
Law No. 61/92 "*Which approves and ratifies the Vienna Convention for the Protection of the Ozone Layer and others".*
Law No. 96/92 "*On Wild Life*".
Law No. 234/93 "*Which approves Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, adopted at the 76th International Labor Conference, held in Geneva on June 7, 1989* ".
Law No. 251/93 " *Which approves the Convention on Climate Change. ".*
Law No. 253/93 "*Which approves the Convention on Biological Diversity* ".
Law No. 294/93 "*On Environmental Impact Assessment* ".
Law No. 352/94 "*On Protected Forest Areas* ".
Law No. 1.160/97 "*Penal Code*".
Law No. 716/96 "*Which Penalizes Crimes against the Environment* ".
Law No. 1.447/99 "*Which approves the Kyoto Protocol of the United Nations Framework Convention on Climate Change ".*
Law No. 1.507/99 " *Which approves the amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer* ".
Law No. 1.561/00 "*Which creates the National Environment System, the National Environmental Council and the Ministry of Environment* ".
Law No. 1.863/02 "*Agrarian Law / Statute*".

Law No. 2.524/04 " *On the ban of activities that transform and convert land covered with forests in the Eastern Region"* and the subsequent laws extending its validity.
Law No. 3.001/06 "*On valuation and compensation for environmental services".*
Law No. 3003/2006 *" Which approves the agreements between the government of the United States of America and the Government of the Republic of Paraguay, under the Tropical Forest Conservation Act (TFCA) framework, for establishing a tropical forest conservation fund and a council for tropical forest conservation as well as the reduction of certain debts with the government of the United States of America and its agencies, from June 7, 2006; and that extends the Nation's overall budget for the fiscal year 2006."*

Decree No. 13,680/92 "*Under which a natural reserve park area covered by the San Rafael Mountains, under the name of San Rafael National Park is declared".*
Decree No. 16,610/02 "*Under which the category for managed resource reserves is assigned to the reserve for Parque Nacional San Rafael. "*
Decree No. 5,577/05 *"Under which Decree No. 16610 of March 7, 2002 is repealed"*
Decree No. 5,638/05 *"Under which the Parque San Rafael reserve area is extended"*
Decree No. 10.247/07 *"Under which Law 3.001/06 on valuation and fees for Environmental Service is partially regulated."*

Resolution of the Ministry of Environment (SEAM) N° 200/01 "*Under which the management categories, zoning, the uses and activities are allocated and regulated".*
Resolution of the Ministry of Environment (SEAM) N° 531/08 "*Under which the requirements and conditions for the Certification of Environmental Services are set out* ".

1.2. ANALISIS OF THE MOST SIGNIFICANT LEGISLATION

"San Rafael" is created by Decree No. 13,680 of May 29, 1992. Its 1st Article reads:

> *"San Rafael" National Park is declared as reserve area, the area covered by the Cordillera de San Rafael, with an approximate area of 78,000 hectares .*

And the 2nd Article adds:

> *The Ministry of Agriculture and Livestock, through its units, gives the delimitation of the area corresponding to the reserve area for National Park referred to in the first Article of this Decree, as well as the technical and administrative management of the same.*

Thus, according to the Decree of creation, there is no doubt that "San Rafael" is **not** a National Park but a "*Park Reserve Area*". We shall leave its implication for later.

It also warns that the "San Rafael" area is not clearly located or determined by the Decree, since the only reference it provides that includes the mountain range of "San Rafael" and that its surface is *approximately* 78.000 hectares. It should be added that the delimitation and management should be established by the administrative authority for the application (the then Ministry of Agriculture and Livestocks). In short, the location and exact area remained undetermined, as a result, it is inadmissible to claim that Decree 13,680/92 has created a national park. Two subsequent decrees (16,610/02 and 5,638/05), certainly delineated the "San Rafael" area, but one of them (16,610/02) established the category for *Managed Resource Reserve* and the other (5,638/05) again uses the name *"National Park"*. However, as we shall see later that it never complied with other requirements for the establishment of a national park and its area is currently not delimited.

We shall now try to determine which is the legal nature of “San Rafael”. According to the 4th and 11th Article of Law 352/94, the *Protected Forest Areas* can be under public domain (national, departmental or municipal) or under private domain. Thus, it should be understood that when the law speaks simply of *Protected Forest Area*, it is referring to those under public as well as private domain; otherwise the law would differentiate it and refer to it specifically as “*Forest Area under public domain*” (Art. 14. d, f, g, h, i, j; 23, 24, 25) or a “*Forest Area under private dominion*” (Art. 14.d,e,g; 26, 27, 28, 29, 30). Let's remember that the 4th Article provides specifically that *“[T]he Protected Forest Areas can be under national, departmental, municipal o private domain*”. From the above provisions, the following classification emerges:

Departmental Protected Forest Area
- Under public domain
  - National
  - Municipal
- Under private domain

It is therefore apt that we determine if the area established in Decree 13,680/92 is found under any of the categories provided in the law. Let's be reminded that the aforemenioed decree declares the San Rafael area as “*national park reserve area*”. While the Decree is above the law (and its definitions), the Decree is specifically incorporated into the National System for Protected Forest Areas by Article 63 of the Law; it equates the concept of

“*reserve area*” utilized in the Law, with that of “*reserve area for national park*” used in Decree 13,680/92.
This comparison is clearly established in Art. 65.c of Law 352/94, which requires the Enforcement authority to submit to the Congress a draft for the "*payment or compensation to owners whose properties are affected by the Declarations of reserve areas for Protected Areas under public domain of the Art 63*”.[1] Consequently, it should be understood that the San Rafael area is a *"Reserve Area for Protected Forest Areas under public domain."* As such, the idea of San Rafael being an area under private domain is discarded, as the law itself provides that its destination is obviously to be a *national* public domain.

However, for it to be under national public domain it is inexcusable that the procedure for the expropriation and payment of the just price (market price) of the buildings within the area be executed first. Thus, according to the constitutive Decree of "San Rafael", we are not in the presence of a *Protected Forest Area* neither under private nor public domain.

It must be said that Art. 65 of Law 352 contains an unfortunate internal ambiguity (perhaps a contradiction), where the first part reads: "*The enforcement authority shall provide to the Congress a technical proposal for reclassification and delimitation of the* ***Protected Forest Areas*** *referred to in Article 63",* it should be noted that the above described in Article 63 (which include San Rafael) are classified as *“Protected Forest Areas "*and not merely as *"reserve areas"*. But later in subsection c), it speaks of: “…

[1] Lets remember that Art. 63 incorporates Decree 13,680 declaring the San Rafael area as park.

payment or indemnization project to the property owners who are affected by the Declaration of ***Protected Forest Reserve Areas*** *under public domain of Article 63*". As can be seen clearly in the same Article 65, in one paragraph it is referred to as "***Protected Forest Areas*** cited in Article 63", but just a few lines below, it talks about "***Reserve Areas*** ***for Protected Forest*** *under public domain of Article 63.*" Faced with this dichotomy, incompatible with each another, the interpreter must choose between alternatives. In the present case, it does not seem that difficult to determine that the qualification as *Protected Forest Area* is an error and should be understood that it in fact refers to *Reserve Areas for Protected Forest*, as said later, in a proper manner. What we just highlighted shows the immense incongruence with which the law was drafted and the conceptual as well as terminological confusion committed by the legislator. In such situations the interpreter is forced to make decisions as to the meaning, based on the principles of harmonization and to avoid interpretations that lead to contradictory or irrational consequences. Based on these criteria, it is more congruent to argue that San Rafael **cannot** be considered a *Protected Forest Area*, but rather a *Reserve Area for Protected Forest*. Indeed, many Articles of Law 352 recognizes the existence of the *Reserve Areas* (Art. 10, 24.b), 64, 65, etc.), which leads us to conclude that this classification exists and is explicitly recognised by law; furthermore, it has an explicit explanation in Art. 10, which says:

> *Article 10.- Every private property that has been declared* ***Reserve Area*** *by the respective law is considered as such and shall remain under that name up till the completion of the settlement process for the conversion into a Protected Forest Area under public domain.*

However, please note that in referring to the *Reserve Areas*, the law does not qualify them as *categories*, but speaks of "*denomination or name*", because, in fact, it does not correspond to any of the categories recognized by our legal system. Consequently, a *Reserve Area* is not, strictly speaking, a *management category,* but a mere *denomination*.

Let's recall that Art. 14.g) of Law 352/94 attributes to SEAM the power to "*assign the management categories, which are considered as technically relevant, to the Protected Forest Areas under public and private domain"*. Likewise, Art. 31 of the Law states that: "*The enforcement authority shall allocate and regulate the Management Categories for the Protected Forest Areas under public and private domain, for the purposes of the statutory declaration".* In exercise of such attributes, SEAM issued Resolution No. 200/01, by which it allocates and regulates the *management categories.* From the reading of the said resolution, it appears that there is no *management category* that corresponds to the *Reserve Areas*, from which it is concluded that the Reserve Area is not a *management category*, but - as we have said before and in accordance with terminology of the same Law 352/94 – merely a *name /denomination*, in other words, is a name used by the law to refer to a state of affairs that is prior to any *Management Category*. We must also say, that the *Management Plan* is developed for every *Protected Forest Area*, according to subsection h) of Art. 14 of Law 352/94. Then, a *Management Plan* cannot be developed for those that have not previously been declared as *Protected Forest Area*.

Since such a *denomination* exists, “San Rafael” can only belong to it.[2] Moreover, the same Decree 13,680/92 (on the creation of "San Rafael") qualifies it as *Reserve Area*; a qualification that was not changed by Law 352 – that Decree 13,680/92 incorporated fully and without modification. It is important to remember also the denomination used in Article 64 of Law 352, which reads :

> *Pending settlement(payment) of the necessary requirements for the legal declaration as Protected Forest Area both as a public as well as a private domain, established in Articles 27 to 30 of this Law, those* ***Potential Protected Forest Areas*** *that are identified within SINASIP's Plan as prepared by the Directorate od National Forest Parks, shall be integrated into the National Protected Forest Areas System (SINASIP) as Reserve Areas.*

This denomination known as *Potential Protected Forest Area* introduces the idea, quite clearly, that current Protected Forest Areas can distinguish from the potential ones.[3] So reserve areas are not protected now, but potentially[4], that is, in the future and after the completion of the requirements for the legal declaration as Protected Forest Areas.

We can also add that to consider San Rafael directly as *Protected Forest Area*, would be to advocate an unconstitutional interpretation, because it would mean that “San Rafael” became a national park without a fair compensation and the prior

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[2] Lets remember also that the Agrarian (Law 1.863/02) makes the distinction, by which it must be admitted that reserve areas are recognized as a particular class not only in Law 352/94. In effect, the Agrarian Law states in its Article 41: Protected Forest Areas. The lands of the estate of the Enforcement Agencies, that observe the ecological and environmental features, will be declared as Reserve Areas for establishment of protected areas under Public Domain, and that capacity must be transferred gratuitously to the Management Authority of Application of Law No. 352/94 "On Protected Areas". The identification of these areas will be done jointly with the Ministry of Environment.

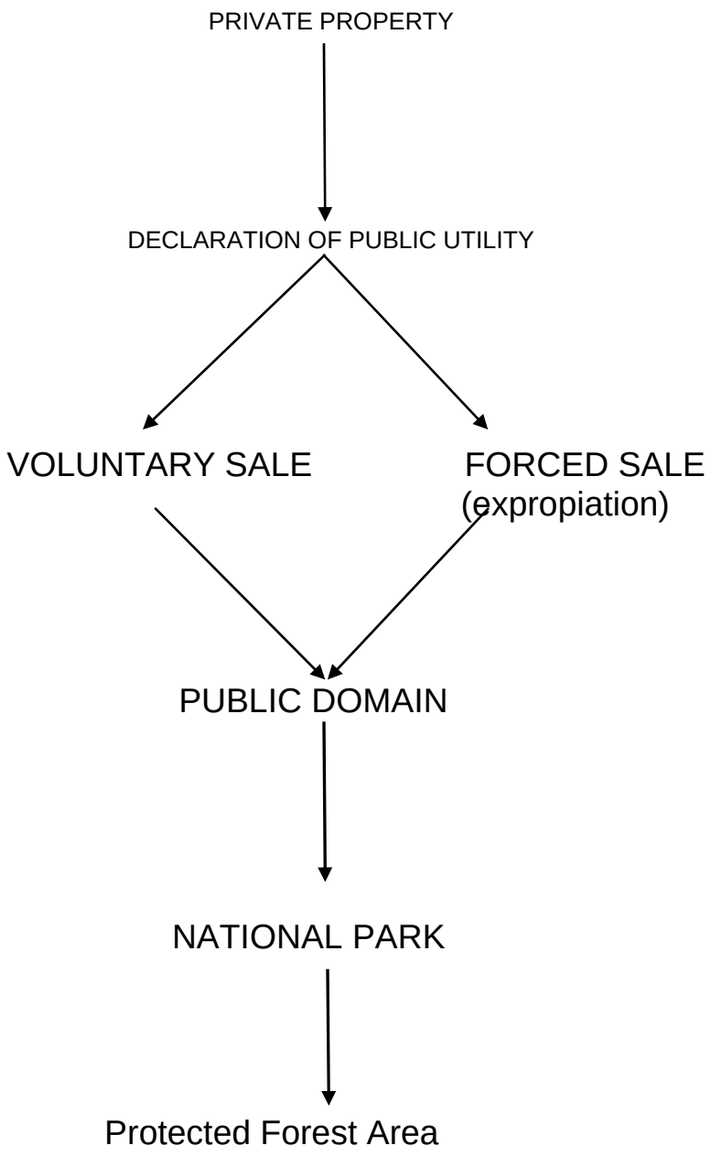
[3] Art 20.d) speaks of "Existing or Projected Protected Areas, which seems to correspond to the concept of" Potential Protected Areas. .

[4] According to Diccionario de la Real Academia, what potential is "| | 3. Can happen or exist as opposed to what exists. "

expropiation that the Consitution requires as an inexcusable condition for a private property to be converted into a public property. Thus, there is no solid argument (except that it is based on a drafting error), which may lead to the conclusion that "San Rafael" is a *Protected Forest Area* and not a *Reserve Area for Protected Forest*.

It is clear that "San Rafael" has not entered into public domain, because the privately owned buildings in it.was never for sale or expropriation in favor of the State.

In order for a private property to integrated into a National Park, the sequence should be as follows:[5]



In the case of “San Rafael” the process has been interrupted at the SALE stage, having only completed its declaration as *public utility*.[6]

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[5] Art. 24.c) of Law 352/94.

[6] The declaration of public utility arises from the 2nd Article of Law 352/94, which reads: "The National System of Protected Forest Area is declared as of social interest and public purpose..." and

It is very important to note that in defining the 4th article of Law 352/94 which is understood as *Protected Forest Area*, it states:

> *Any portion of the national territory within the well defined limits (boundaries), of natural or semi-natural characteristics that are subject to resource management is defined as* ***Protected Forest Area***

Note that by definition the *Protected Forest Area* should be subject to a given management category. The “San Rafael” area does not have any of the categories of management provided in Resolution No. 200/01 of SEAM, so it does not meet a basic requirement of the definition of *Protected Forest Area.* It must be added that "San Rafael" also has no *well defined limits*, as required by law.

However, according to Art. 10 of Law 352, “*all those private property that has been declared by the respective law as* ***Reserve Forest Area*** *are understood as such and shall remain under this denomination up till the completion of the settlement process for the conversion into a Protected Forest Area under public domain.*” And Art. 24.b adds that the privately owned properties “*shall be considered as Reserve Forest Areas by the Enforcement Authorities until the administrative and legal process for converting it into Protected Forest Area under public domain has been completed”.* Consequently those private properties that are **in the process** of conversion into *Protected Forest Areas* under public domain belongs to *Reserve Forest Areas*; basically, that process consists of the transfer via a voluntary sale or expropriation (forced sale) to the State. What is certain is that it undoubtedly has to do with private properties which will eventually and finally be sold to

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makes mention of Decree 16610/92 of Art 132 of the Constitution. Lets remember that the Reserve Areas belong to the National System of Protected Areas.

the State. Let's remember that in the Paraguayan legal system, the transfer of a real estate to the State can only be completed first by payment of the price. In fact, the Constitution states in Art. 109:

> *The private property is not violable. Nobody shall be deprived of his property except persuant to a court ruling, but expropriation is only allowed for reasons of public utility or of social interest, which shall be determined by law in each case. This shall guarantee the prior payment of a fair compensation established either conventionally or via a court decision,...*

It seems clear, therefore, that the private properties found in the San Rafael area **are not *Protected Forest Areas*** given that they have not even been converted due to the lack of payment of the price that completes the transfer and as well as its constitution as a *Protected Forest Area* under public domain. But we must add that, while they are not *Protected Forest Areas*, nevertheless, all private property belonging to the *Reserve Forest Areas,* have *domain restrictions*, and this is the only difference from any other property belonging to the private domain.[7] "*Domain restrictions*" are certain limits that the law imposes on the use and enjoyment of the property. In other words, they constitute a reduction to the absolute character of the property, which, although it remains intact, has certain limits established for the exercise of the rights for a better society.

Thus, Law 352/94 (On Protected Forest Areas), is applicable to real estates within the Reserve Forest Area, only as prescribed in Art. 24.b, where the relevant part states: "…, *the owners, from the*

[7] Law 352/94 expressly speaks of "resttrictions of dominion and use" in Article 27, so there's no problem to admit that those covered by Article 24.b) are precisely the domain restrictions in the technical sense of the term.

point of receiving the notice, shall stop all activities likely to cause disruption to the natural, cultural or other types of resources. The owners shall not have any rights over any incorporated improvements beginning from the notice." In short, there are only two *domain restrictions* referred to in Law 352/94, namely: a) alterations to the natural, cultural or other resources are prohibited and; b) it is impossible to receive compensations for improvements to the property done from the moment of notice. It should be highlighted, however, that the first restriction is a major constraint to the domain, because it is extremely broad and vague. In effect, the law does not define what is meant by "*alteration of the natural resources*".[8] For example, can renovations to the then existing plantations be considered as alterations to natural resources? Can the same farm activities that continued after the notice and that were already taking place before the notice be considered as alterations to the natural resources? In principle, the answer to both questions should be negative. However, if it has to do with alteration of water and forestal resources, such protection is guaranteed by other laws that the declaration of *Reserve Area for Protected Forest* do not require. So, eventually, the natural resources whose alteration should be prohibited by Law 352/94 would be wild life (animal); in other words, no hunting would be allowed. However, we have determined that the *Reserve Forest Area* is not a *Protected Forest Area*, but it has the effect of creating domain restrictions for private properties belonging to the *Reserve Forest Area*, these restrictions remain in force for the duration of the acquisition process by the State.

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[8] According to the Diccionario de la Real Academia de la Lengua Spanish, "to alter" means to change the essence or form of a thing.

The dilemma in this case, seems quite clear : is the San Rafael area a national park or not. If it is a National Park, then, it is a *Protected Forest Area*; but if it is not a national park, then it is not *Protected Forest Area*. But, given that to be a national park it must belong to the public domain (See Art. 15.c of Resolution 200/01 issued by the Ministry of Environment) and the “San Rafael” area is made up of private properties, it therefore cannot be a national park and, consequently, it is not a *Protected Forest Area*. Thus San Rafael is not currently a *Protected Forest Area* but only potentially, subject to the expropiation of the private properties that it comprises, which are under the domain restrictions imposed by Law 352/94.

It is now up to us to ask whether these domain restrictions are in force and how long they can last. With regards to the validity of the domain restrictions, we must say that it is highly probable that it is force in very few cases, since Law 352/94 (Art. 24.b) requires the notification of the restrictive dominion by the Enforcement Authority to be within thirty days from the issue of the Decree or Law. In the case of San Rafael we do not have knowledge that such notification have been sent to the property owners, meaning that the restriction on the domain is not in force; this means that the prohibition for making alterations to the natural resources cannot be required from San Rafael's property owners (at least the majority of them). It should be highlighted that Law 352 expressly requires notification by the Enforcement Authority (Ministry of Environment), being insufficient the mere publication of the law or Decree in question. Let's recall that the 24 states in a pertinent part: “*Also, the property owners begining from the notification, shall cease from all activities likely to produce alterations to the*

natural, cultural or other resources". Therefore, in the absence of notification of such declaration, the owners are not in any way obliged to cease from activities that are likely to produce alterations and shall be able to require payment of any improvements made on the property. [9]

However, the domain restrictions that weighs on the "San Rafael" area are matters of public administrative law, because they have to do with the interest of the society in general and not with individuals. Thus, they should be analized in the light of the Administrative Law and not of the Civil Law. The eminent author of Administrative Law Dromi Roberto says:

> *The limitations imposed in the interest of the public directly affects the absoluteness, the exclusivity and the perpetuity ot the property.*
> *In relation to exclusivity, it has, as a legal effect, a break up of the property; in relation to perpetuity its effect is the deprival of the property; and in relation to the absoluteness, it has as effect an inherent weakness in the property in general. They temper the absolute the administrative restriction and the seizure; with a object of breaking up the property using the administrative rights, the expropriation of use and the seizure; and the result being the extinction of the porperty is the expropriation, the confiscation, and the requisition of the property.*[10]

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[9] It should be noted that according to information obtained from the SEAM, domain restrictions have been recorded in the General Register Office, which we do not believe that it meets the requirement of the law which requires every owner to be notified. In effect the owner can only be notified of the registration if it constitutes some form of right on the property, in which case a request of the report regarding the conditions of domain via a Notary Public, will create an awareness of their registration . In conclusion, whether or not the owner is notified of the domain restrictions imposed by law, it must be analyzed on a case by case basis. It should not be forgotten also that the limits of "San Rafael" have changed over time, by virtue of the various decrees issued in this regard, so no one can know with certainty whether the final property is or not within the area of the future National Park

[10] Refer to Roberto Dromi. ADMINISTRATIVE LAW, Ed. Ciudad Argentina, Buenos Aires, 1995, pp. 582.

As it is quite obvious from the quotation above, the “San Rafael” area is subject to an *administrative restriction* of the property that affects the absoluteness of the right to the property, causing a general weakening of the same.[11] The main weakness consists of the prohibition to conduct “*activities likely to produce alterations to the natural, cultural and other types of resources”.* Such administrative restriction arises from Art. 24.b) of Law 352/94. However, it should be noted that there are also other *administrative restrictions*, which have their origin in different laws. Thus, Law 2,524/04 provides that, for a period of two years, conducting of transformation or conversion activities on areas covered with forest is prohibited in the Eastern Region, agricultural areas in any form, or areas destined for human settlements.[12] Furthermore, Law No. 422/73 “*Forest Areas*”, provides in Art. 42 that all rural properties of twenty hectares in forested areas must maintain a 25% of its area forested naturally and, in the case where such a minimum percentage does not exist, the owner must reforest an area equivalent to 5% of the property.

Some of the generally accepted characteristics of *administrative restrictions* are the following: a) they are **varied and unlimited**, and therefore may have a content that is widely diverse, only limited by the reaonability of the restriction; b) they are **inalienable** and therefore not extinguishable by the lack of use; c) **they are not compensable**, so the limitations on the property do not have

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[11] Note that it is sometimes difficult to accurately determine if it is in the presence of a domain restriction or easement. However, for this case, the distinction does not seem to be an issue of fundamental importance.

[12] The law had two consecutive extensions, so the ban was extended currently until 2010.

a financial compensation that the owner can demand.[13] It is important to note that, in accordance with this, the owners of “San Rafael” area will not be entitled to any compensation for the domain restrictions imposed.

With regards to the period that the owners should bear the domain restriction, it is unlimited unless the expressly provided by the law. However, we have to remember that Law 352 contains some provisions relevant to the matter. Art. 24.c) states

> *c) Within the term of sixty (60) days of notification , if the owner(s) do not express their consent to the sale of the Reserve Forest Area, the property will be expropriated, upon request of the Enforcement Authority to ensure just compensation under the terms set out in the Expropriation Law for the purpose of social utility. Property, whether owned or not, with settlements of indigenous communities shall not be affected by this subsection ; and,*

It follows that the owners could be notified - even if they have not yet - and express their consent to sell, or allow a period of sixty days, with which the State must proceed with the expropriation of the property. While our legislation contains no deadline for the expropriation, the foreign law and doctrine provide the assumption of *abandonment;* that is, when the State fails to exercise its right to expropriate within a certain period, it is presumed to have lost interest and therefore cannot exercise expropriatory jurisdiction and therefore the owner can no longer be dispossessed of the property. About the matter, Dromi stated :

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[13] It is important to note that although the majority doctrine contends that the administrative restrictions are not compensable, it must be admitted that other part of the doctrine (as well as jurisprudence) maintains that they are compensable if the right of domain is affected.

> *The <u>abandonment</u> strengthens the legal certainty of right over the property because it prevents the owner of the property subject to expropriation from remaining in a state of uncertainty about the effectiveness or otherwise of the expropiación.1 .*[14]

Thus, given the inaction of the State for almost 17 years, the owners of the “San Rafael” area could fall back on legal actions that will eventually conclude in the disappearance of the *San Rafael National Park's Reserve Area for Protected Forest*. We want to note that the passive attitude of the owners is in part due to the ineffectiveness of the domain restrictions imposed in the area, but if these restrictions were put in place rigorously, they would probably cause some kind of reaction, with no undesirable consequences for “San Rafael”.

However, when analyzing the final decree in relation to "San Rafael" (Decree No. 5.638/05), we must note that by enlarging its surface, it expressly confirms that it is a "*<u>reserve area</u> for the San Rafael national park*", which leaves no doubt about the category that San Rafael is now under: This is a *Reserve Area* for national park that has not reached the status of *Protected Forest Area under Public Domain*.

However, we must remember that an earlier Decree (N ° 16,610/02) states:

> *1st Art. The area within the limits (boundaries) described in the 2nd article of the present decree and located in Itapúa y Caazapa is declared as the **San Rafael Managed Resource Reserve**.*
> *2nd Art. The San Rafael managed resource Reserve shall be within the following geographic locations, with the following limits which shall form its perimeter.*

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14 Roberto Dromi, op. cit., pp. 605.

The change in status is due to the same Decree. 16,610/02

> … *all the land within the delimited area make up the private properties,* ***it is therefore impossible to keep them under the National Park category.*** *Because of that it is necessary* ***to modify the category for national park*** *by adopting a national park conservation category that reconizes the current land tenure system in the delimited surface for the reserve area, the managed resource reserve area being the most convenient since it recognizes the current use of natural resources that the farms within the same possess.*

We should consider, therefore, the value and the validity of Decree 16,610/02.

The Republic's General Comptroller, through CGR Resolution Nº 114/04 has warned SEAM that Decree 16,610/02 has been issued in violation of Law 352/95. In effect, the Comptroller textually states:

> *By Decree Nº 16610, dated March 7, 2002, the category for Managed Resources Reserve is assigned for San Rafael National Park, with a surface area of 70,130 hectares 73 m2 5,100 cm2.*
> *Law No. 352/94, in its article 24º subsection d) provides that "Any modification in its condition as Protected Forest Area under the Management Category and the reduction of limits can only be conducted by the National Law, except for additions or extensions that may be established by Decree, according to established procedures by this Law and its regulations."*
> ***Observations 1 to SEAM****:* ***a)*** *At the request of SEAM, the category of Protected Wilderness San Rafael was amended through a decree, in contravention of the provisions of Law No. 352/94.*
> *b) The area referred to in Decree No. 16610/02 (70,130 hectares 73 m2 5,100 cm2) is smaller in approximately 7870 ha, with respect to the surface area of 78,000 hectares set in Decree No. 13680/92, which creates the ASPSR.*

c) *This Audit, in accordance with the provisions of art. 24 º subsection d) of Law No. 352/94, believes that this Decree does not comply with the regulations in the mentioned legal body, which sets the guidelines to be followed for changing the status of an ASP.*

Conclusions 1 for SEAM: a) *In the context, from subsection d) of the 24th article of Law No. 352/94 "On Protected Forest Areas" the following is expressed: Decree Nº 16610/02 is after Decree Nº 13680/92. Regarding the change of category management, the Law is as clear as it was…Any modificaction in its… Management Category and in the reduction of limits can only be made by the National Law… situation not evidenced in the 2nd decree set out above, since the same in its 1st article states: "The surface area within the described limits in the 2nd article of the present decree, located in Itapúa and Caazapa is declared as San Rafael Managed Resources Reserve ", that is, the management category is changed or is put under another category by decree rather than by the National Law which is how the legal process derives. Administrative actions (Decree 16610/02 of PE) always require the prior existence of a legal basis (Law No. 352/94), as it must comply with the law. If this legal basis that protects the administrative action is lacking, it is invalid. As a result, both the principle of the formal legality, (which refers to the rules of the procedure) as well as principle of the material legality (legal basis of the administrative resolution) affect the administrative actions in the sense that its compliance is inexcusable under penalty of nullity. Here, the situation of issuing a decree in the absence of legal bases or extension beyond the legal framework, and the application of the same decree with the said extralegal bases assuming he law that contradicts it as legal reason. In the first place, Decree Nº 16610/02, assigns* ***RPNSR*** *the* ***RRMRPNSR*** *management category different from that assigned in 1992, which as it was noted; the new category becomes inapplicable and illegal because the law prescribes it that way. Thus, in interpreting a behaviour through the application of all the provisions of the law would require an analysis in conjunction, so that they may fit together without contradictions so as retain all its validity. Law No. 352/94 is not itself a violation. This, according to the criterion by which the law cannot be interpreted so that its provisions are in conflict and destroys each other, unless – on the contrary – conserving all its value so that they may reconcile. In this sense it should be understood that the object of the*

administrative law included in Decrees Nº 13680/92 and 16610/02; the subjects that necessarily form part of the law and are used to idividualize it (its natural content); the issues sent to contain by the authority of the law (its implicit content), and the clauses that the State may introduce additionally in the form of a condition, term and mode (its eventual content). For its part, as to requirements, its purpose must be, inter alia, lawful. The object should not be banned or disallowed by the normative order. The illegitimacy of the object may be a violation of the Constitution, Law No. 352/94, or Decreto Nº 13680/92. This demonstrated that ***ASPSR*** *is confirmed, in the first place, according to the Decree of its creation, and secondly, as provided in Law No. 352/94 of ASP. The Administrative laws (Executive Decree) cannot nullify the laws which concerns the public order. The reduction of limits and the change of category management made to the* ***ASPSR*** *was done via the Executive Decree, where such changes can only be made by Nation's law. That is, being obliged to comply with the law, the Executive Power issued Decree Nº 16610/02 endorsed by the Ministry of Interior, thereby violating the law and subverting the constitutional order of priority, basic principle of the Rule of Law, apart from the proceedings foreseen in the Constitution and the 24th article subsection d) of Law No. 352/94 "On Protected Forest Areas". In this context, it is concluded that all the provisions and laws of the authority are devoid of all validity or contrary to those established in the Constitution and the corresponding laws. That is, that the Executive Power (year 2002) issued the decree apart from the legal procedures in force in relation with the reduction of the limits and category assigned to* ***ASPSR****.*

From the dictum of the General Comptroller of the Republic, it appears, without doubt, that the constitution considered it illegal and as a result Decree 16.610/02 is invalid, we share the same view.

We should note, however, that there is a contrary view held by the Comptroller.[15] According to the same, Decree 16,610/02 could establish any level of management because “San Rafael” was not, until then, a *Protected Forest Area .* Thus, the restriction imposed by subsection d) of Art. 24 of the Law 352/94 which restricts any form of modification not introduced by the law of the Congress, is not applicable to “San Rafael”, (the subsection is transcribed later in this document). While we share the opinion that “San Rafael” was not (and continues not to be) a *Protected Forest Area*, yet we believe that the modification could not be done simply by an Executive Decree. In effect, since the incorporation of Decree 13.680/92 (on the creation of “San Rafael”) to Law 352/94 (Art. 63), no change in the status of “San Rafael” could be made unless by another later law; the Decree is therefore insufficient.

Furthermore, Art. 65 stipulates that “The Enforcement Authority *must present to the National Congress a technical proposal for reclassification and delimitation of the Protected Forest Areas cited in Article 63”*. Lets remember that “San Rafael” appears in the abovementioned Art. 63, consequently, the *reclassification* or *delimitation* of “San Rafael” should, necesarily go through the National Congress, which requires the sanction of law in a formal sense Accordingly, Art. 25 of Law 325/94 states: “*If the Management Plan determines another category of management that is different from the assigned, or recommends adjustments to the limits, the provision in subsection d) of Article 24*” *shall follow*. Let's note that subsection d) established the need of a Congress Law. However, even accepting that “San Rafael” is a potential

[15] Refer to "Technical Opinion" Ezekiel Santagada with contributions from Juan Pablo Cinto, for USAID and Panambi.

Protected Forest Area but not a current one, there is no doubt, however, that the Decree of its creation 13,680/92 has established a management category that corresponds with the *National Park* (Category II of Resolution N° 200/01, of SEAM).

But the strongest reason to support the illegality of Decree 16.610/92 is given by what is provided in the mentioned Art. 10 of Law 352/94, which states:

> *Article 10.- Every private property that has been declared* ***Reserve Area*** *by the respective law is considered as such and shall remain under that name up till the completion of the settlement process for the conversion into a Protected Forest Area under public domain.*

From a reading of the provision it is clear that the Reserve Area should necessarily remain under that denomination until the settlement process of State's purchase has been completed. Thus, no Decree can come in to change the legal status of a *Reserve Area*, it could do so only through a Congress Law via a the repeal of Article 10 above. The other way to change the status of the Reserve Area is to proceed with the purchase of property for transfer to the public domain.

Therefore, it seems clear enough that under the rules referred to, the category of the *Reserved Area* cannot be changed unless by a Congress Law or by a transfer to the public domain.[16]

We understand from Resolution N° 114/04 from the General Comptroller of the Republic that questions the validity of Decree 16,610/02 gave rise to Decree 5,577/05 which states:

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[16] See Art. 24.a) of Law 352/94.

> ***1st Article -*** *To repeal Decree No. 16.610 of March 7, 2002, "By which the the San Rafael National Park is assigned the category of Managed Resources Reserve", entering into effect from the date of Decree No. 13.680 of May 29, 1992.*

Thus, Decree 16,610/02 was repealed with the following legal consequences a) The legal status of "San Rafael" returns as stipulated in Decree 13,680/92; b) "San Rafael" again becomes a *Reserve Area for Protected Forest, without* management category; c) "San Rafael" lacks delimitation, since the limits of "San Rafael" were set by Decree 16,610/02, which has lost all validity.

Subsequently, Decree No. 5,638/05 was dictated, which establishes:

> ***1st Art. -*** *To expand the San Rafael Reserve Area for National Park situated in Itapúa y Caazapá.*
> ***2nd Art. -*** *The expanded area covers from Cerro San Rafael area, within the following geographical points, …*
> ***3rd Art. -*** *The terrains affected by this Decree shall be considered the perpetual heritage of the State, under the responsibility and administration of the Ministry of Environment.*
> ***4th Art. -*** *For the purposes of the 1st Article of this Decree, the Ministry of Environment shall request the inclusion in its annual budget of the relevant items and may manage the necessary resources of the cooperating national and international entities.*
> ***5th Art.-*** *The Ministry of Environment shall comply with Article 24 of Law 352/94 from the term of this Decree .*

The text deserves the following commentaries: a) The Decree begins from the false assumption that "San Rafael" has a delimited area and that the same is an expansion of that, but, let's recall that once having repealed Decree 16,610/02 "San Rafael" remains

without delimitation of area;[17] b) the affected terrains are destined to be a perpetual heritage of the Paraguayan State,[18] which is obviously incompatible with the category of *Managed Resources Reserve,* previously provided by Decree 16,610/02, that instituted the said category for the purpose of maintaining the private property of the “San Rafael” area; c) SEAM has been given the order to obtain the relevant funds for the purchase and expropriation of the affected terrains, which is a clear return to the original idea of the *National Park*, and a recognition that the process has not been perfected*;* d) to ordain in the 5th Art. 5° of the Decree the application of Art. 24 of Law 352/94 it returns explicitly to the *Protected Forest Area* project *under public domain*, since that is what the article in question is about. Furthermore, it is implicitly recognised that the modification in the management category cannot be brought about by Decree except by Law and that the only thing that that legal instrument can do is the addition or expansion of the area. In effect, subsection d) of Art. 24 states:

> *Any change in the condition of the Protected Forest Area under the Management Category and the reduction of limits can only be established by Law (of the nation), except in the case of addtions or expansions that may be established by Decree according to the processes established by this Law and its regulations.*[19]

In short, we see quite clearly that the legal status of “San Rafael” is determined by the Decree of its creation and that, consequently, is a Reserve Area for Protected Forest of public domain, currently without delimitation nor specified area.

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[17] This is what is often described as a technical loophole.

[18] It should be understood that this will happen only once the sale is completed, either voluntarily or by expropriation.

[19] The disaffection of a zone by Decree 18,694/97 for the formation of the Colony "La Amistad," seems, well, illegal

It is also, somehow, relevant to the preparation of the project of sequestration, as provided in Art. 10 of the Agrarian Law (Law 1863/02), which says:

> ***Article 10.- Properties and unaffectable areas****. The following areas and properties shall not be considered as unproductive latifundiums and thus are subject to expropriation under the terms of this law:*
>
> *a) properties declared as Protected Forest Areas Under Private Domain by the competent administrative authority as provided by Law No. 352-93;*
> *…*
> *c) natural forest areas or planted areas destined for the secuestration of carbon and other environmental uses according to the laws and regulations provided for in this regard by the competent administrative authority in environmental management;*

To conclude this section, we will make reference to Law No. 3003/2006 (debt swap with the United States of America), which in its Article V it states that the amounts deposited in the Fund will be used to provide grants to conserve, maintain, or restore tropical forest areas, including "San Rafael" - through one or more of the following types of activities:

> ***A.*** *These activities could include, for example, demarcation of new and expanded protected forest areas and indigenous reserves, the establishment of protected forest areas and security areas, identification of unique forest areas or representatives, or inventory and protection of areas that are rich in species and high levels of endemism;*
>
> ***B.*** *These activities could include, for example, the development and implementation of scientifically reliable systems for managing forest land and forest resources, assessment and inventory of forest resources, monitoring and evaluation of the use of land and resources, implementation of criteria and indicators for a sustainable*

forest management, development and implementation of information systems related to forest management, development and implementation of ecosystem management of watershed and forest management strategies based on community adoption of research-based forest technologies, establishment of plantations on degraded lands; regenerating natural forest rehabilitation and management, or testing and implementation of silvicultural techniques;

C. *Training programs designed to enhance the scientific, technical and administrative of individuals and organizations involved in forest conservation efforts. These activities could include, for example, short-term training courses, internships and study tours, development of community outreach services, environmental education and public awareness programs, increase of university program in forestry management or conservation biology, or education and training to develop the capacity of local NGOs;*

D. *Restoration, protection, or sustainable use of various species of animals and plants. These activities could include, for example, rehabilitation of degraded forests, sustainable hunting, fishing and animal husbandry, improving forest health and vitality and research and development relevant to efforts to evaluate and address problems of forest law enforcement and illegal practices;*

E. *Research and identification of medicinal uses of plants from tropical forests to treat human diseases, ailments and health related matters. Such activities could include, for example, ethnobotanical studies, sample collection and analysis, or preparation of technical documentation, publication and dissemination;*

F. *Developing and supporting the livelihoods of individuals living in or near a tropical forest in a manner consistent with protecting such tropical forest. These activities could include, for example, the development of women's businesses and community-based enterprises and other businesses of livelihoods in harmony with the environment that relate to wood or non-wood products; low impact harvesting practices and application of methods of soil conservation, establishment of agro-forestry systems, or development of species of trees for multipurpose uses outside the natural forests.*

The agreement provides that for the guide for approval of projects (grants), the Council may identify priorities as deemed necessary in relation to specific activities *"with special emphasis on projects to improve and consolidate the protected areas within the San Rafael National Park Reserve, which contains a rich diversity of endangered native species compared which calls for human intervention. "*

As it can be seen, the project does not collide with the law analyzed at all, neither does it seem to affect the component of additionality. In effect, according to the documents of the project, the same is required to not be ordained by some law or other regulatory framework that are in force in the country.[20] Thus, although Law 3.003/06 establishes the possibility of important benefits for the "San Rafael" area, this does not mean that the guideline of the project coincides with a mandate imposed by this law.

2. ANSWER TO THE SECOND ISSUE

For sure, in the Paraguayan legal system there are many laws governing the acquisition, possession, use, etc.. of land in relation to communities and indigenous groups. Thus it can be mentioned as an example that Law No. 904/81 "Law *of Indigeneous Communities"* regulates the issue in articles ranging from 14 to 27. For its part, Law No. 234/93 "*That approves Convention No. 169 concerning indigenous and tribal peoples in independent countries,*

[20] According to the VOLUNTARY CARBON STANDARD (VCS): "*The project shall not be mandated by any enforced law, statute or other regulatory framework"*.

adopted at the 76th International Labor Conference, held in Geneva on June 7, 1989 ", also deals with the topic in a number of provisions contained therein. For example, the 6th Article establishes the obligation of prior consultation and participation in relation to legislative or administrative measures that may affect indigenous peoples. Article 7 refers to the previous studies to be performed in social, spiritual, cultural or environmental incidences, that may have development activities. Articles 13, 14, 15 and 16 provide, specifically the issues of land. In particular, Article 14 states that the peoples concerned should be recognised as having the right of ownership and possession over the lands which they traditionally occupy. In addition, where appropriate, steps should be taken to safeguard the right of the peoples concerned when using lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.

The "UN Declaration on the Rights of Indigenous Peoples", adopted by Resolution approved by the General Assembly on September 13 of 2007. The issue of tenure and ownership of their ancestral lands are outlined in Articles 8, 9, 10, 26, 27, 28, 29 and 32. They enshrine the right to live in their territories, to use in its traditional form, not to be displaced from them, the just compensation in cases of deprivation of their lands, the conservation and protection of the environment and the productive capacity of their lands or territories and resources, to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. Finally, Article 32 establishes that:

…

2. *The States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent before approving any project affecting their lands or territories and other resources, particularly in relation to development, utilization or exploitation of mineral resources, water or other.*

3. *The States shall provide effective mechanisms for just and fair redress for any such activities and take appropriate measures to mitigate adverse environmental, economic, social, cultural or spiritual consequences.*

The important thing to note is that the consultation and participation of indigenous communities refer to the **administrative or legal measures** to be taken by the State and provided that they concern their lands or territories. For privately owned buildings, we do not believe that the query is a legally enforceable requirement. It is true, as it is obvious, that individuals cannot take action that violates the rights of the indigenous communities involved.

It must be said, moreover, that according to information provided by INDI, the predominant ethnic group in “San Rafael” (area for which the Indians called Tekoha Guasu) is the Mbya Guarani, with about 20 indigenous communities, of which five own their land and eleven are located in private properties. Indigenous people suffer, too, from the problem of land invasions by peasants in the area. In short, the indigenous communities of San Rafael have important unresolved issues, but they are not a legal concern for the majority of owners in the area of San Rafael. "

Based on the assumption that there are no official complaints from indigenous communities in the area regarding the properties of Guyra Paraguay, from the rules discussed there should not be any

legal obstacle to the REDD project in the making. It could be said also that it is foreseeable that a REDD project benefits and does not harm indigenous communities in the area, as well as the planned National Park.

In fact, the complaints that are occasionally outlined, are more closely related to moral and practical issues than legal issues. For example, it is suggested that environmental service projects that compensate environmental services legalize the destruction of the environment in other places because they offset the negative impact brought about by paying a sum of money for the protection of biodiversity elsewhere. It also affirms that the payment for environmental services benefits only those who have the economic capacity to manage and have the right domain, causing a marked inequality in relation to the poorer inhabitants. It is added, frequently, that conservationist activities raises the market value of the terrains, creating again a prejudice against the poorer people (which include the indigenous people) who lose the ability to acquire them. Moreover, it has been said that private protected areas could result in limited access to hunting and gathering that indigenous communities complain about. It affirms, finally, that it is morally reprehensible to profit from what is the heritage of all mankind, imposing on the environment a mercantil character. Actually the issues are related, rather, against any form of protection, whether publicly or privately, as being contrary to the rights of traditional communities in the area. However, while the Paraguayan State maintains the validity of legal rules that provide for the creation of the Parque Nacional San Rafael, I must say that such questions have no basis in the positive Paraguayan law.

To conclude this paragraph, it should be noted that under the CCB Standards,,[21] evaluations and consultations are required if the project could disrupt activities that are important to the lifestyle and culture of communities of indigenous peoples the area.

3. ANSWER TO THE THIRD ISSUE

From the evaluation of the legal framework applicable to the *Reserve Area for Protected Wilderness "San Rafael Park"*, we may conclude the following::

1. **"San Rafael Park" does not exist**. "San Rafael" is created by Decree No 13,680 of May 29, 1992, that declares the Cordillera "San Rafael" area as "a ***reserve*** *for the park". A*ccording to Law 352/94, nothing indicates that "San Rafael" is a *Protected Forest Area.* Likewise, according to the management categories under Resolution No. 200/01 of SEAM, "San Rafael" cannot be included in category II (National Park), by not having the features described there.

2. **"San Rafael" is *not* a Managed Resource Reserve.** This assertion deserves the following clarifications. Although there is a Decree (16,610/02) which declares it as a Managed Resources Reserve, the same has been repealed by Decree No. 5,577/05. Moreover, a subsequent Decree (5,638/05) returns to it the name "National Park Reserve for San Rafael", ignoring all the time the category Managed Resource Reserve, so it can be understood to have been left without effect.

[21] Refer to General Secction, Section G5, Indicators, Numerals 3 y 4.

3. **“San Rafael” is not, strictly speaking, a *Protected Forest Area***. While Decree 13,680, of its creation, incorporates it to SINASIP, this does not mean that it is indeed a Protected Forest Area. We believe that in reality is a "Potential Protected Forest Area" according to the qualification made in Article 64 of Law 352. Therefore, "San Rafael" has no integral protection for a *Protected Forest Area*.

4. **The real estates within the area of "San Rafael" are private properties that have only a restricted domain.** The properties included in "San Rafael" for not being a Protected Widlife Area, do not have the same legal regime as such, but a different one, which merely impose on the estates of coverage, *domain restrictions*, referred to in Article 24.b) of Law 352. It is worthwhile to add that because of other legal provisions - which are not related to the *Protected Forest Areas* -, the San Rafael area also has a domain restriction imposed by Law 2524/04 (and the subsequent extensions) as well as established in Article 42 of Law 422/73.

5. **Traditional rights of indigenous peoples.** Such rights have been recognized, granting them various farms in the area (over 10,000 ha.), which are excluded from the future national park "San Rafael", by express provision of Article 25.c). In effect, since they cannot be either sold or expropriated, these properties can never be in the public domain of the State, which is an essential prerequisite for its

integration into the National Park. In relation to claims that indigenous communities may have with respect to any REDD project in "San Rafael", there would be no legal basis, but at most grounds of practicality or morality.

It is my opinion

Juan Carlos Mendonça Bonnet